

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF &
APPENDIX**

77-2039

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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CIRO RICCARDI,
Petitioner-Appellant

vs.

No. 77-2039

UNITED STATES OF AMERICA,
Respondent - Appellee

----- x

ON APPEAL FROM THE UNITED STATES DISTRICT FOR THE
EASTERN DISTRICT OF NEW YORK

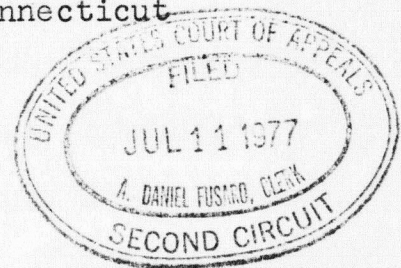
Brief of Petitioner-Appellant
And Ciro Riccardi
Appendix

Submitted By:

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To Be Argued By:

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* * * * *

PRELIMINARY STATEMENT

This is an appeal from the March 24, 1977, decision and order of the United States District Court, Eastern District of New York, (Platt, D.J.) which denied petitioner-appellant Ciro Riccardi's Motion, pursuant to 28 U.S.C. 2255, to vacate sentence.

On August 29, 1975, following trial and conviction of violating 18 U.S.C. 894, appellant was sentenced to a term of twenty years ~~pursuant~~ ^{pursuant} to the provisions of 18 U.S.C. 4208(c).

PAGINATION AS IN ORIGINAL COPY

Following psychiatric examination and report, appellant was - on May 28, 1976 - sentenced to an eight year term pursuant to the provisions of 18 U.S.C. 4205(b)(2). Subsequently, on December 2, 1976, the Court - granting a motion for reduction of sentence basxd on appellant's "deteriorating mental condition" - reduced the imposed term to six years.

DECISION BELOW

Judge Platt's decision is reported in Riccardi v. United States, 428 F. Supp. 1059 (E.D.N.Y. 1977) and is set forth in the appendix.

QUESTIONS PRESENTED

Was the sentencing Court required to conduct a suasponste competency hearing in this case and, if so, was appellant entitled to such a hearing upon a section 2255 motion?

Did appellant's pro se section 2255 motion raise sufficient "detailed and controverted issues of fact" as to require an evidentiary hearing?

As a result of the protracted sentencing proceedings - during which the Court was presented with a series of psychiatric reports indicating appellant's deteriorating mental condition and recent suicide attempt - did the Court's failure to heed that "flurry of warning flags" by conducting a competency hearing later mandate a retrospective hearing into appellant's competency not only at time of sentence but also trial?

In denying the section 2255 motion, did Judge Platt erroneously rely on the "apparent regularity of the proceedings" and fail to attribute significance to appellant's pre-sentence suicide attempt?

STATEMENT

When appellant first appeared for sentencing on August 29, 1975, his former trial counsel, James La Rossa, informed the Court appellant did not reveal to the probation officer that since July 11, 1974, he had been receiving psychiatric treatment

from Dr. Dominick Carlissi because he was "afraid" the Court would hold it "against" him. After counsel informed the Court appellant had a history of psychiatric problems ^{DATING} ~~dated~~ back to his early school years - and rejection from military service for psychiatric reasons - he referred to a submitted letter from Dr. Carlissi attesting to appellant's psychiatric condition and treatment. The Court stated it had not been aware of the "Severity" of appellant's psychiatric problems and then committed him for "psychiatric study" and "independent report" pursuant to 18 U.S.C. 4208(c).

On April 19, 1976, after receiving a putative psychiatric finding of competency from the Springfield, Missouri, Medical Center For Federal Prisoners, the Court stated that it also had a contrary report from Dr. John Train. The report from Dr. Train, dated February 2, 1976, concluded appellant had a diagnosis of "depression with anxiety situational with underlying paranoid personality trait" and was in need of "psychotherapy". The Court, after being apprised appellant had collapsed in a detention cell and had been returned to Metropolitan Correctional Center, stated it was uncertain what to do at that time (page 13) and then put the matter off to a later date.

Subsequently, on April 23, 1976, the Court alluded to the reports from Springfield and Dr. Train but stated there was no "testimony". Presumably referring to a hearing, the Court then erroneously stated at page 5: "As I pointed out to you the last time, I am diametrically opposed to one." Assistant U.S. Attorney Marsha Katz informed the Court that appellant attempted to commit suicide at Metropolitan Correctional Center (page 12), cf. Drope, V. Missouri, 420 U.S. 162 at 180-182, and noted that "all psychiatrists agree Mr. Riccardi has certain psychiatric problems." The M.C.C. psychiatrist, Dr. Naomi Goldstein was present in Court and described appellant's suicide attempt as

"very serious" (page 18) and opined that she believed appellant. Pending appellant's examination by an independent psychiatrist and a report, the matter was again put off.

On May 28, 1976, counsel called the Court's attention to the report of the independent psychiatrist, Dr. Falsey. Among other things, the report established that appellant suffered from a form of "mental illness" known as the "Ganser Syndrome" which is included in a group of "rare" unclassifiable, collective and psychotic syndromes." Parenthetically, it is significant that here, as in United States v. Polisi, 514 F.2d 977 at 980 (2nd Circuit 1975), Dr. Falsey - and the other psychiatrists - did not relate the diagnosis to appellant's "ability to understand and assist at the trial and sentencing proceedings." Counsel also alerted the Court to a portion of Dr. Falsey's report which related that appellant heard voices ("Come over here.. We are happy here....I hear he is dead...") and had dreams of dead people. Upon inquiring about the latter, counsel stated appellant informed him that he (appellant) was not sure "if they are dreams". The Court, although alerted to appellant's mental condition, imposed sentence without conducting a sua sponte hearing to determine appellant's competency.

POINT ONE

THE SENTENCING COURT WAS ALERTED
BY A "FLURRY OF WARNING FLAGS"
THAT A SUA SPONTE COMPETENCY DE-
TERMINATION WAS REQUIRED IN THIS
CASE.

I

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It is settled that the conviction of an insane person violates due process (Bishop v. United States, 350 U.S. 961; Pate v. Robinson, 383 U.S. 375 at 378) and that the standard for competency is whether the defendant has both a rational and factual understanding of the proceedings coupled with an ability to consult with counsel with a rational degree of understanding.

Dusky v. United States, 362 U.S. 402.

In United States v. Sullivan, 406 F.2d 180 (Cir. 2nd 1969), this Court stated at page 185:

"No part of a criminal proceeding, may be proceeded with against a defendant who is at the time insane or otherwise so mentally incompetent as to be unable to understand the proceedings against him or to properly assist in his own defense."

To safeguard against an insane person being tried or sentenced, the Supreme Court and this Court insist that where, as here, there is sufficient doubt as to a defendant's sanity, the trial court must conduct a hearing sua sponte to determine his competency. Drope v. Missouri, 420 U.S. 162, Pate v. Robinson, *supra*, Saddler v. United States, 531 F.2d 83 (2nd Cir. 1976). The failure to conduct a sua sponte hearing in an appropriate case is a denial of due process (Drope) and entitles the defendant to a retrospective determination of his competency. See: ^{Wojtowicz} ~~Wojtowicz~~, v. United States, 550 F.2d 786 (2d Cir. 1977); Saddler v. United States, *supra*; United States v. Polisi, 514 F.2d 977 (2d Cir. 1975), *inter alia*.

In United States v. Marshall, *supra*, Judge Claire stated, at page 450, what remains the law of this Circuit:

"If the report of the psychiatrists 'indicates' a state of mental incompetency in the accused, the Court must then hold a hearing and make a finding on the competency question."

Similarly, as Judge Lumbard made clear in Wojtowicz, V. United States, *supra*, at page 791, where it is apparent at the sentencing proceedings that the defendant lacked mental capacity, the Court should order an examination or hearing. See e.g., Saddler v. United States, *supra*, at pages 86-87.

II

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When applied to the record in this case, the teaching of Marshall and Saddler compels the conclusion that a competency determination was urgently required.

The record establishes: Subsequent to the putative competency finding from the Springfield Medical Center - and during the protracted proceedings - the sentencing Court was not only aware appellant's condition was deteriorating, but that Doctors Falsey and Goldstein "indicated" he was mentally ill. Equally important, Dr. Goldstein earlier notified the Court of appellants suicide attempt and counsel reported that appellant was having conversations with dead people on the date of sentence; the Court was so concerned over appellant's condition as to make "special arrangements" that he be committed to the psychiatric ward of the institution where he would serve the imposed sentence. Yet the sentencing Court, consistent with its April 23, 1976, statement of being "diametrically opposed" to a hearing, never made a determination of appellant's competency.

Whether considered alone or together, the recent reports of Doctors Falsey and Goldstein indicated appellant was mentally incompetent (Marshall, supra at 449); the suicide attempt (Wojtowicz, supra, at 790; Drope v. Missouri, supra at 180-182) and the bizarre fact appellant was uncertain whether he was conversing with dead people on the date of sentence. (Saddler supra) operated to vitiate the earlier Springfield finding and required the Court to make a sua sponte determination of appellant's competency.

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That neither Dr. Falsey or Goldstein related appellant's condition with his ability "to understand and assist at the trial and sentencing proceedings" did not relieve the Court of the responsibility of making a competency determination. See: Polisi, supra, at 980. In describing appellant's deteriorating mental condition, Dr. Falsey used such words and phrases as "psychotic"...."mental illness"...and "Ganser Syndrome." To a layman such terminology could mean only one thing: mental incompetence.

Under Marshall and Saddler, Dr. Falsey's report - coupled with Dr. Goldstein's verbal opinion and report of appellant's suicide attempt - indicated a state of incompetence in appellant and provided more than the requisite reasonable cause for a sua sponte competency determination.

POINT TWO

APPELLANT WAS ENTITLED TO A SECTION
2255 HEARING TO RESOLVE HIS COMPET-
ENCY AT TIME OF TRIAL AND SENTENCE.

Retrospective competency hearings have been ordered by this Court in cases where the indications of mental illness were far less apparent than in the instant case. Wojtowicz v. United States, 550 F.2d 786 (2d Cir. 1977); Saddler v. United States, 531 F.2d 83 (2d Cir. 1976); United States v. Polisi, 514 F.2d 977 (2d Cir. 1977) inter alia.

In Wojtowicz, the defendant contended that on the morning of sentence he attempted to take a drug overdose and slashed his wrists. After finding that Wojlowicz' claim found "support" in a 1973 Rule 35 affidavit from his former lawyer and therefore entitled him to a section 2255 hearing, Judge Lumbard wrote for this Court at page 790:

"If appellant's allegations are true they raise a serious question as to whether he was able meaningfully to exercise his right of allocution or rationally comprehend the nature of the proceedings."

Here, in addition to the relied upon psychiatric reports, appellant's contentions are supported by Dr. Goldstein's April 23, 1976 statement of the attempted suicide. Appellant's sufficiently detailed and controverted section 2255 motion was therefore based on facts outside the record (suicide attempt) and is supported by the record (Dr. Goldstein's statement). Cf. Wojtowicz, supra. As this Court held in Wojtowicz at Note 5:

"To a large extent the issue of appellant's competency will turn upon whether the alleged suicide attempt actually took place. If the evidence shows there was no such attempt, the Court's inquiry will be at an end. If the suicide attempt is found to have occurred, then it will become necessary for the Court to order an examination to determine whether appellant was competent to be sentenced."

In Saddler, the Court received a pre sentence report, indicating that the defendant "had a history of mental illness including hospitalization in the Harlem Hospital in 1969 after an attempted suicide and in the Bellevue Hospital in March 1972" and was advised that counsel found the defendant to be "incoherent" on the day of sentencing. 531 F.2d at 85. The Court imposed sentence without conducting a hearing to determine competency and thereafter denied a motion for a section 2255 hearing. This court reversed and ordered a hearing to determine Saddler's competency not only at time of sentencing but at the time of his guilty plea. The Court held at pages 86-87:

"Against this background it was error to proceed with sentencing since it was apparent that appellant lacked the capacity to exercise his right of allocution. Rule 32 (a) F.R.C.P.; United States v. Malcom, 432 F.2d 809 (2nd Cir. 1970). The proper course was to defer sentencing, pending the conduct of a court-ordering section 4244 examination and hearing to ascertain his capacity to proceed. United States v. Knohl, 379 F.2d 427, 435 (2nd Cir) cert. denied 389 U.S. 973. Furthermore, having been alerted by this flurry of warning flags to the possibility that appellant might also have been mentally incompetent to plead two months earlier, the Court should have directed that the section 4244 examination be expanded to determine the defendant's competency to plead."

Here, unlike Saddler, during the protracted proceedings, the Court was constantly aware of the "severity" of appellant's deteriorating mental condition and, on the date of sentence, had a series of psychiatric reports the latest of which, from Dr. Falsey, indicated appellant was mentally ill. That, together with appellant's suicide attempt and the voiced opinion of the Metropolitan Correctional Center psychiatrist, Dr. Naomi Goldstein was more than ample indication appellant "lacked the mental

capacity to proceed with sentencing." Saddler, supra, at 86; Wojtowicz, supra. Also see, Drope v. Missouri, 420 U.S. 162 at 180-182. Thus, as in Saddler, the Court should have conducted a competency hearing before imposing sentence.

In Polisi, a presentence report indicated the defendant had been discharged from the Marine Corps after a diagnosis of "pericarditis and emotionally unstable personality" and was an out patient at the Veterans Administration where he was treated for "chronic brain syndrome associated with psychotic (schizophrenic) reaction". A subsequent psychiatric examination pursuant to section 4208 (b) revealed that defendant's participation in a bank robbery "was part of a continuing emotional deterioration" and that he had a "long history of emotional problems requiring chronic outpatient psychiatric care." The sentencing Court did not make a determination of competency. This Court reversed. Chief Judge Kaufman stated for the Polisi Court at page 980:

"Since we find that the evidence of the appellant's psychiatric history in the presentence report coupled with the conclusions of the section 4208(b) study, at least provided the reasonable cause required by section 4244, we conclude that the failure to determine that issue was erroneous."

Here, as in Polisi, Dr. Falsey did not relate appellant's diagnosis with his ability "to understand and assist at the trial and sentence proceedings". A hearing was therefore required to determine whether appellant's "particular psychiatric or mental problem for any reason renders him incompetent to understand the judicial proceedings then underway against him or to assist in his own defense." Polisi, supra, at 980.

POINT THREE

THE DECISION DENYING APPELLANT'S SECTION 2255 MOTION WITHOUT AN EVIDENTIARY HEARING WAS ERRONEOUS AND IN CONFLICT WITH THE APPLICABLE LAW.

1. The Attempted Suicide

In denying appellant's motion for a competency hearing, Judge Platt failed to attach any significance or weight to appellant's attempted suicide. Such a failure is in direct conflict with the teaching of this Court. See: Wojtowicz v. United States, supra; Saddler v. United States, supra. As the Wojtowicz Court held at note 5:

"To a large extent the issue of appellant's competency will turn upon whether the alleged suicide attempt actually took place."

2. The Psychiatric Examinations and Reports

That a second psychiatric report of examination was ordered after appellant's attempted suicide did not, as Judge Platt, concluded, justify the failure to conduct a competency hearing. If anything, the reports of Doctors Falsey and Goldstein "indicated" appellant was mentally ill and therefore mandated a competency hearing. United States v. Marshall, supra. Under Marshall, a competency hearing can be dispensed with only where the psychiatric reports indicate a defendant is not mentally incompetent.

Conceding that none of the psychiatric reports in this case referred to the legal standards of competency as outlined in Section 4244, Judge Platt paradoxically concluded that they yet indicated a hearing was not required. Such a determination clashes with this Court's holding in United States v. Polisi, supra. In Polisi, a retrospective competency hearing was ordered where, as here, the psychiatric reports did not relate the defendant's diagnosis with his ability "to understand and assist at the trial and sentencing proceedings."

3. Apparent Regularity of the Proceedings

Here, as in Wojtowicz, Judge Platt erroneously utilized the "apparent regularity of the proceedings" to deny a section 2255 competency hearing. This Court, in reversing and ordering a hearing in Wojtowicz, recognized that in a competency issue

the "apparent regularity of the proceedings is a most untrustworthy criterion. Judge Lumbard wrote for the Wojtowicz Court at page 790:

"However, the apparent regularity of the proceedings cannot conclusively show that appellant's claim, which is based on facts outside the record, is without merit. United States v. Miranda, supra, 437 F.2d at 1257-58; United States v. Malcom, 437 F.2d 809, 813 (2nd Cir. 1970)."

To support the finding that a competency hearing was not required, Judge Platt depended on a self-serving statement by appellant's former trial counsel, James La Rossa, Esq. On August 29, 1975, in alluding to appellant's psychiatric history and condition, Mr. La Rossa stated: "I don't suggest to your honor that in any way they rose to the level where y Mr. Riccardi could have defended the act by insanity or any such thing."

It is unlikely that any attorney would be eager to admit that he recently proceeded to trial with a client who may have been insane and neglected to consider interposing an insanity defense. In any event, Mr. La Rossa's remarke was made ten months before appellant's mental deterioration, attempted suicide and the reports of Doctors Falsey and Goldstein. The issue was not what Mr. La Rossa may have thought on August 29, 1975, but whether, from the reports and information available to the Court on May 28, 1976, a sua sponte competency hearing should have been conducted. Finally, it cannot be ignored that on the date of sentence - May 28, 1976 - the Court was aware of the suicide attempt and the reports of Doctors Falsey and Goldstein but was informed by appellant's new counsel, Benton Becker, Esq., that appellant was hearing voices and was uncertain whether he was having dreams - and conversations - with the dead. Cf. Saddler, supra.

Under the label "apparent regularity of the proceedings", Judge Platt also attributed significance to appellant's inability to claim "he was under medication or addicted to drugs". This is not only erroneous but operated to impose an impossible burden on appellant. Following appellant's attempted suicide, Dr.

Goldstein prescribed massive daily dosages of an unknown medication or drug and, on the day of sentence, appellant was heavily sedated. Consequently, since the Supreme Court has ruled that pro se litigants should not be expected to comply with the standards of precision and exactness imposed on experienced lawyers (Haines v. Kerner, 404 U.S. 519) it was improper to deny entitled relief merely because appellant - whose competency was never resolved - could not allege the name of the medication or drug he was under the influence of on the date of sentence. The "apparent regularity of the proceedings" therefore cannot be used to "conclusively show" appellant's contention, which is based on facts outside the record (attempted suicide and drugs) is without merit. Wojtowicz, supra, at 790.

4. Court's Observation of Appellant During Trial

Appellant contended that following trial and psychiatric examination at Springfield, he suffered an intervening mental deterioration to the extent that, as reflected by the attempted suicide and reports of Doctors Falsey and Goldstein, he was incompetent when sentenced one year later - on May 28, 1976 - and the Court should have made a sua sponte competency determination. From January 1976 until May 1976 appellant - who did not take the stand and testify at his trial - was confined at Springfield and Metropolitan Correctional Center.

Yet section 2255 relief was denied because Judge Platt "observed petitioner consulting with his attorney on a number of occasions during trial" (page 11) and "on his regular employment record" (page 14).

This incredible distortion of the law requires no extended discussion. Where, as here, the observations are remote from the time in issue they simply cannot be accurate or relevant gauges in a competency issue. Cf. Zovluck v. United States, 448 F.2d 339

(2d Cir. 1971); United States v. Vowteras, 500 F.2d 1310 (2d Cir. 1974). That appellant may have been seen briefly talking with his lawyer in 1975 or have worked does not mean he was later competent on May 28, 1976. Insane people are noted for their incoherent loquacity and, sadly enough, history teaches that madmen have been diligent workers. Under Judge Platt's reasoning, no one who was ever observed talking or working could ever later go insane or be found incompetent. Aside from not allowing for an intervening change in a defendant's mental condition, it ignored the other factors which signaled the urgent need for a competency determination in this case: the attempted suicide, reports of Doctors Falsey and Goldstein; influence of medication and the voices ~~supplement that~~ appellant was hearing on the date of sentence.

5. Sufficient Detailed and Controverted Factual Allegations.

Judge Platt concluded that appellant failed to set forth "sufficiently detailed factual allegations". A glance at appellant's motion reveals more "sufficiently detailed and controverted factual allegations" than were set forth in the Wojtowicz and Saddler cases where this Court ordered retrospective competency hearings.

POINT IV

THIS CASE PRESENTS
"UNUSUAL CIRCUMSTANCES
REQUIRING A SECTION
2255 HEARING.

The aim of a psychiatric examination and/or hearing is to ascertain whether the defendant has the "ability to understand and assist at the trial and sentencing proceedings." However, because of the "unusual" circumstances of this case, that question has never been resolved and a section 2255 hearing is therefore required. Wojtowicz v. United States, supra at 791.

As Judge Platt's decision acknowledged, none of the psychiatric reports referred to the legal standards of competency as outlined in section 4244. The matter is further complicated by the fact whatever significance or credibility the Springfield report may have had was later vitiated by appellant's conditions and the reports of Doctors Falsey and Goldstein which indicated he was mentally ill. A competency hearing was the only practical solution to the problem.

This Court, in Wojtowicz, stated at page 791:

"In U.S. ex rel Curtis v. Zelker, 466 F.2d 1092 (2d Circuit 1972) this Court held that where, as here, a defendant has been found competent in an examination conducted pursuant to 18 U.S.C. 4244, the district court is not required to hold a competency hearing before accepting a plea and 'absent some unusual circumstances...a section 2255 collateral attack on the sentence based on the same ground will not ordinarily be permitted'. 466 F.2d at 1100, quoting Hanson v. United States, 406 F.2d 199, 202 (9 Cir. 1969)."

The "unusual circumstances" here, are that appellant was never found competent in any psychiatric examination. If anything, the reports of Doctors Falsey and Goldstein indicated he was mentally ill. Accordingly, under Wojtowicz, supra, the Court should have held a competency hearing and appellant is now entitled to a section 2255 hearing "based on the same ground."

CONCLUSION

The order denying section 2255 relief should be reversed and hearing ordered to determine appellant's competency at time of sentence and trial.

Respectfully submitted,

CIRO RICCARDI
Appellant Pro Se
Pembroke Station
Danbury, Connecticut 06810

STATE OF NEW YORK, COUNTY OF *Kings*

ss.:

is over 18 years of age and resides at

being duly sworn, deposes and says: deponent is not a party to the action.



Affidavit
of Service
By Mail

On

19 *77*

deponent served the within

upon *Robert Erickson, Criminal Div Dept. of Justice*

attorney(s) for *deponent*

in this action, at *60 Box 919 Van Hook Station*

the address designated by said attorney(s) for that purpose
by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in — a post office — official
depository under the exclusive care and custody of the United States Postal Service within the State of New York.



Affidavit
of Personal
Service

On

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deponent served the within

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herein, by delivering a true copy thereof to h
person so served to be the person mentioned and described in said papers as the

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therein.

Sworn to before me on

19 *77*

MARTIN LIGHT

Notary Public, State of New York

No. 24-2362820 - Qual. In Kings Co.

Commission Expires March 30, 1978

John Marano
The name signed must be printed beneath

John Marano